

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAVINCE M. PATRICK,	§
	§ No. 446, 2008
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0504024696
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 4, 2008

Decided: January 20, 2009

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 20<sup>th</sup> day of January 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, LaVince M. Patrick, filed an appeal from the Superior Court's August 25, 2008 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit. We agree and affirm.

(2) In January 2006, Patrick was found guilty in a Superior Court bench trial of Attempted Burglary in the Second Degree and Resisting Arrest. He was sentenced as a habitual offender to 8 years at Level V, to be followed by probation. Patrick's convictions and sentences were affirmed by this Court on direct appeal.<sup>1</sup>

(3) In this appeal from the Superior Court's denial of his postconviction motion, Patrick claims that a) his constitutional rights were violated when the State sought an indictment against him for attempted burglary after the charge had been dismissed at his preliminary hearing; and b) his trial and appellate counsel's ineffective assistance resulted in his convictions at trial and affirmance of his convictions and sentences on appeal.

(4) Patrick's first claim is that the State may not secure an indictment on a charge that was dismissed at the preliminary hearing. The record reflects that the charge of attempted burglary was dismissed at Patrick's preliminary hearing. The record further reflects that, when Patrick's case was presented to the grand jury, he was indicted on charges of attempted burglary and resisting arrest. However, contrary to Patrick's argument, Delaware law permits the State to institute a prosecution for an

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<sup>1</sup> *Patrick v. State*, Del. Supr., No. 170, 2006, Steele, C.J. (Mar. 15, 2007).

offense by indictment even if the defendant was discharged from that offense at the preliminary hearing.<sup>2</sup> We therefore conclude that Patrick's first claim is without merit.

(5) Patrick's second claim is that both his trial and appellate counsel provided ineffective assistance that caused him to be convicted and caused his convictions and sentences to be affirmed on appeal. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>3</sup> Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."<sup>4</sup> As support for his ineffectiveness claim, Patrick contends that he was not guilty of resisting arrest. However, this Court has ruled that there was more than sufficient evidence presented at trial to support Patrick's conviction of that charge.<sup>5</sup> As such, there is no support for an ineffectiveness claim against Patrick's

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<sup>2</sup> Super. Ct. Crim. R. 5.1(b); *Turner v. State*, Del. Supr., No. 265, 2002, Berger, J. (Dec. 13, 2002); *Evans v. Redman*, Del. Supr., No. 4, 1987, Horsey, J. (Apr. 28, 1987).

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>4</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

<sup>5</sup> *Patrick v. State*, Del. Supr., No. 170, 2006, Steele, C.J. (Mar. 15, 2007).

counsel on that basis and we, therefore, conclude that his second claim is without merit.

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 25(a), that the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice